RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the

members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Advisory Committee's Notes
January 1, 2001

P.L. 1999, Chapter 731, §§ZZZ-2 *et seq*. unified the Superior Court and the District Court civil jurisdiction, with certain stated exceptions. Rule 23 is amended to delete the reference to the Superior Court, since class actions may now also be brought in the District Court.

Advisory Committee's Notes
1981

Rule 23 is amended by substituting for the present Maine rule the verbatim text of Federal Rule 23.

When the Maine Rules were first promulgated in 1959, Federal Rule 23 as it then stood was adopted virtually verbatim. The present federal rule was promulgated in 1966, but the Maine rule was not changed to follow suit, because Maine's experience with class actions had been limited and it seemed wisest to allow time for local development. Nevertheless, the more detailed and specific provisions of the new federal rule were viewed as appropriate guidelines for class action practice in Maine. *See* 1 Field, McKusick, and Wroth, *Maine Civil Practice* § 23.1 (2d ed., 1970). Since 1966 there has been an increasing number of class

actions in the Maine courts, and it has become clear that a more specific and authoritative procedural provision for such actions is necessary.

The present federal rule is adopted for three reasons: (1) It codifies in general the pattern previously followed in Maine and it has over the years been the subject of a substantial body of interpretation in the federal courts which is available as further guidance to the Maine practitioner. *See* 1 Field, McKusick, and Wroth, *supra*, §§ 23.1-23.6; 7 and 7A Wright and Miller, *Federal Practice and Procedure* §§ 1751-1803 (1972; Supp., 1981); (2) The Maine practice has not yet become systematized enough to provide the basis for a rule reflecting significant local variation from the federal model; and (3) The only alternative, the Uniform Class Actions [Act] [Rule], adopted by the National Conference of Commissioners on Uniform State Laws in 1976, 12 *Uniform Laws Annotated* 20 (Supp. 1981), is admirable drafting but deals with a range of complex problems which have not yet arisen, and may never arise, in Maine.

Promulgation of the rule marks a new departure in class actions for Maine. It is to be expected that experience with the more systematic procedure afforded by the rule will lead to amendments designed to adapt its provisions to the specific conditions and needs of Maine practice.

Reporter's Notes
December 1, 1959

This rule is based upon Federal Rule 23, but with significant departures. Rule 23(a) is much simpler than the corresponding federal rule and takes into account some serious criticisms which have been made of that rule. The language is taken from a recommendation made by Professor Chafee. Chafee, *Some Problems of Equity*, Chap. 7.

Class actions brought by or against representatives of a class so numerous as to make it impracticable to bring them all before the court were well known in classical equity practice. Whitehouse, *Equity Practice* §§ 162-165. The principal types of cases in which this principle of representation was applied were creditors' bills, stockholders' bills, and bills of peace. *See, by way of illustration, Mason v. York & Cumberland Ry. Co.*, 52 Me. 82, 107ff. (1861); *Carlton v. Newman,* 77 Me. 408 (1885). The innovation in Rule 23 is to make this device applicable to all actions, legal as well as equitable.

Rule 23(b) deals specifically with shareholders' derivative actions. The requirement for verification of the complaint is one of the few instances where the rules require verification. Federal Rule 23(b) contains the requirement that the complaint shall aver that the plaintiff was a shareholder at the time of the transaction complained of. That requirement is not included in this rule because of the belief that it calls for a policy judgment which ought not to be effected by rule even if it is thought to be within the rule-making power. There appears to be no Maine decision either imposing or rejecting this requirement, and the omission from the rule is not to be taken as an expression of any view as to whether or not the requirement exists.

Rule 23(c) is designed to protect absent members against unfair dismissal or compromise.

RULE 23A. DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought in the Superior Court by one or more shareholders to enforce a right of a corporation, the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which the plaintiff complains or that the plaintiff's share thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity that the plaintiff has made a written demand upon the corporation to take the suitable action. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the corporation in enforcing the right of the corporation. The action shall not be dismissed or settled without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs if the court determines that a proposed discontinuance or settlement substantially affects the interests of a corporation's shareholders or a class of shareholders.

Advisory Committee's Notes
2004

See Advisory Committee's Notes below Rule 23B for an explanation of this amendment.

Advisory Committee's Notes
1981

Rule 23A is taken with only minor changes from Federal Rule 23.1. The new rule is added simultaneously with the promulgation of new Rule 23, also based on the comparable federal rule. The new Rule 23A is similar in basic effect to the original Maine Rule 23(b) as promulgated in 1959 and now withdrawn. Principal differences are inclusion in the new rule of requirements that the complaint allege that the plaintiff was a member or shareholder at the time of the transaction complained of and that the plaintiff be an adequate representative of the interests of others similarly situated. The former point, though previously an open question in Maine, was resolved for corporations at least by legislative adoption in 1971 of 13-A M.R.S.A. § 627(l) (A), making similar provisions. The requirement of representation was found in original Rule 23(a) and was in any event inherent in the practice. *See* 1 Field, McKusick, and Wroth, *Maine Civil Practice* § 23.2 (2d ed., 1970; Supp. 1981).

In other respects also, the rule is consistent with 13-A M.R.S.A. § 627, respecting actions by shareholders of foreign or domestic corporations. I n actions subject to that provision, however, the plaintiff must allege specifically that he gave written notice of his action to the corporation or board of directors at least ten days before bringing action. Also, by virtue of the last sentence of the statute, it will be "necessary" under the rule to allege or prove demand upon the shareholders only in the case of a close corporation.

RULE 23B. DERIVATIVE ACTIONS BY MEMBERS OF UNINCORPORATED ASSOCIATIONS

In a derivative action brought in the Superior Court by one or more members to enforce a right of an unincorporated association, the association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a member at the time of the transaction of which the plaintiff complains or that the plaintiff's membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the members similarly situated in enforcing the right of the association. The action shall not be dismissed or compromised without the

approval of the court, and notice of the proposed dismissal or compromise shall be given to members in such manner as the court directs.

Advisory Committee's Notes
2004

Rule 23A has been amended to eliminate conflicts between the Rule and the provisions governing derivative actions by shareholders in the revised Maine Business Corporation Act (the "Act" or "new Act"), which the Legislature adopted effective July 1, 2003. P.L. 2001, ch. 640; P.L. 2003, ch. 344.

To conform to the new Act, Rule 23A has been divided into two separate rules: a revised Rule 23A, "Derivative Actions by Shareholders" and a new Rule 23B, "Derivative Actions by Members of Unincorporated Associations." The revised Rule 23A reflects, and changes are made solely to reflect, the requirements of the new Act with respect to derivative actions by shareholders of business corporations. New Rule 23B carries forward without change the provisions of former Rule 23A with respect to unincorporated associations. No substantive changes have been made in rules for derivative actions in unincorporated associations because the new Act has not made any change in the law applicable to such associations.

The changes to Rule 23A to reflect new requirements of the new Act are as follows:

1. The amended Rule requires the complaint to allege with particularity that the plaintiff has made a written demand upon the corporation to take suitable action. The requirement is in the words of 13-C M.R.S.A. § 753(1), which requires that the demand be made upon the corporation *in all cases*. This "universal demand" completely replaces and supersedes Rule 23A's former requirement of a particularized allegation of the plaintiff's "efforts, if any, to obtain the action the plaintiff desires." The revised Rule also eliminates the further language of the former Rule that required "the reasons for the plaintiff's failure to obtain the action or for not making the effort." By requiring that demand be made in all cases, § 753 eliminates the possibility that the demand requirement may be excused if the plaintiff can prove that making the demand would have been futile.

2. The requirement in former Rule 23A that the plaintiff make an effort "if necessary" to obtain the desired action from shareholders or members has

been deleted because under the new Act no such effort is "necessary." Former Section 627(1)(C) of the 1971 Maine Business Corporation Act provided that if the corporation is a close corporation, the plaintiff must allege with particularity "his efforts to secure from the shareholders such action as he desires (or allege) with particularity the reason why such efforts would have been futile." Section 627 went on to state expressly that when the subject corporation is not a close corporation, it is not necessary for the plaintiff to allege or prove a demand upon the other shareholders. That express provision abrogated the rule of prior case law, which had held that for all corporations a demand upon shareholders, as well as upon the board of directors, was required before a plaintiff could properly assert a derivative action.[1] The Advisory Committee's Notes to Rule 23A as previously in effect made clear that a demand was required on shareholders only in the case of a close corporation.[2] Section 753 in the new Act contains no requirement for close corporations that the plaintiff make (or allege) any efforts made to secure from shareholders the action he desires. Given the statutory history, the Rule has been revised to reflect the absence of any such requirement from the new statute.

3. In keeping with 13-C M.R.S.A. § 752(2), revised Rule 23A makes the focus of the required fair and adequate representation by the plaintiff the interests of "the corporation" and not "the shareholders . . . similarly situated," as the former Rule provided. New Section 752 requires that the plaintiff "fairly and adequately represent the interests of the corporation in enforcing the right of the corporation." That new requirement of Section 752 is intended to better reflect the nature of a derivative action, where the plaintiff stands in the shoes of the corporation and not the shoes of other shareholders. Rule 23A has been revised accordingly.

4. The final sentence of Rule 23A has been revised to track closely the language of 13-C M.R.S.A. § 756 pertaining to court approval of discontinuance or settlement of derivative actions and to notice to shareholders of the same.

Section 756 of the new Act provides:

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[1] *See, e.g., Ulmer v. Maine Real Estate Co.*, 93 Me. 324, 327, 45 A. 40, 41 (1899).

[2] Advisory Committee's Notes to Rule 23A contained in 428-433 A.2d (1981) at LII.

> A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement substantially affects the interest of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

Former Rule 23A provided, like Section 756, that a shareholder derivative action "shall not be dismissed or compromised without the approval of the court," but it also declared that notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." Former Rule 23A did not require personal notice to all shareholders, but it did require some form of shareholder notice in all cases. Section 756 now specifies that notice to all shareholders (or a particular class of shareholders) is required only if the court determines in its discretion that the proposed discontinuance or settlement will substantially affect the interests of those shareholders. The Rule has been modified to match the requirement of new Section 756.